

MAY 28 2003

United States v. Johnson
No. 99-15467

CATHY A. CATTERSON
U.S. COURT OF APPEALS

PAEZ, J., concurring:

Because I read the COA as encompassing Johnson's claim that he was denied the right to *effective* assistance to counsel as a part of his claim that he was denied the right to counsel under the Sixth Amendment, I write separately to explain why the district court's decision to hold in camera hearings did not directly nor constructively deprive Johnson of his right to effective counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984) ("[T]he court has recognized that the right to counsel is the right to the effective assistance of counsel." (internal citation omitted)). Johnson argues that he was constructively denied effective assistance of counsel because of his defense counsel's exclusion from the in camera hearings. Johnson claims this prevented his counsel from "participat[ing] fully and fairly" in the fact-finding process and prevented his attorney from effectively litigating his Fourth Amendment claims.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Here, defense counsel's performance was not deficient. Counsel strenuously argued that the informants' identities were tainted and therefore should have been

suppressed. Furthermore, she filed multiple motions to suppress and a motion to reveal the identities of the informants, objected to the holding of in camera hearings without her presence, and submitted questions for the court to ask during the in camera hearings. Moreover, even if counsel's performance was somehow deficient, Johnson cannot meet the prejudice prong of *Strickland* because the results of his trial would not have been different even if counsel had been present in the in camera hearings.

In arguing that he was denied his Sixth Amendment right to counsel, Johnson relies on *Herring v. New York*, 422 U.S. 853 (1975). *Herring* held that a trial court's restrictions that prevented counsel from "participat[ing] fully and fairly in the adversary factfinding process" violated the defendant's Sixth Amendment right to assistance of counsel. *Id.* at 858, 865. Here, Johnson's counsel was not prevented from participating fully and fairly in the adversarial process. As noted, Johnson's attorney submitted questions for the court to ask during the in camera hearings, the government provided Johnson with a redacted transcript of the first in camera hearing, his attorney was afforded an opportunity to interview the informants prior to trial, and Johnson was not prevented from consulting with his attorney. *See United States v. Thompson*, 827 F.2d 1254, 1258 (9th Cir. 1987) (concluding that a district judge's ex parte consideration of whether to reveal to the defense the identity of a government informant generally

does not violate a defendant's Sixth Amendment right under *Herring*). The district court did not violate Johnson's Sixth Amendment right to counsel, including his right to the effective assistance of counsel, when it excluded Johnson's counsel from the in camera hearings. Accordingly, I also would affirm the district court's judgment on this alternative basis.